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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 172

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

J. C. VAN LIEROP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Chesapeake and Ohio Railway Company, petitioner, respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan entered March 10, 1953, in its Case No. 45569—*J. C. Van Lierop* v. *Chesapeake and Ohio Railway Company.*

STATEMENT OF THE MATTER INVOLVED

Petitioner is an interstate common carrier by rail.

On the 3d and 7th of January 1947 two refrigerator carloads, and on the 11th of February 1947 one refrigerator carload, of gladioli bulbs were shipped from Grants Pass,

Oregon, and delivered to respondent by petitioner some ten days to two weeks later at Hartford, Michigan (R. 467-469).

The shippers from whom respondent had bought the bulbs tendered them to the Southern Pacific Company; the Union Pacific Railroad Company and the Chicago and North Western Railway Company were intermediate carriers (R. 123-124).

As provided in the tariff and bills of lading, the cars moved 2,400 miles under carriers' protective service against cold in heater territory and under shippers' specified service against cold, coupled with standard ventilation, for the 90-mile journey beyond heater territory (R. 468-469). Heater territory includes all stations listed on pages 408-413 of Perishable Protective Tariff No. 14, I.C.C. No. 25, the only tariff governing and referred to in this case, published and filed with the Interstate Commerce Commission and admitted in evidence with effective supplements as respondent's exhibit 32 (R. 256). The tariff and supplements will be hereafter referred to as I.C.C. 25. Heater territory may be more simply defined as an area extending from a given point in a northerly direction to the Canadian border and easterly from the Pacific Coast to Chicago, Illinois.

"Carriers' protective service" is the short title commonly used to refer to the heater service offered by heater territory railroads, more accurately described as carriers' protective service against cold. Page 393, I.C.C. 25 (R. 298). The service is defined in I.C.C. 25, Item 1165, as follows:

> "Carriers' Protective Service" means that carriers will protect the shipment within the Heater Territory (see Rule 500) against frost, freezing or artificial overheating, furnishing, if necessary *artificial* heat or such other protective service as may be necessary *to obtain that result* (R. 503). (Emphasis added)

Rule 500 of I.C.C. 25 describes, *inter alia*, heater seasons and heater territory.

Ventilation is defined in Rule 300 of I.C.C. 25 as "the manipulation of hatch covers and plugs of refrigerator

cars * * * to permit or prevent the passage of air through such openings" (R. 512).

Rule 330 of I.C.C. 25 reads as follows:

(A) Ventilation in conjunction with refrigeration service or protective service against cold will be supplied only to the extent authorized in the rules governing the class of refrigeration service or protective service against cold to be furnished (R. 512).

Combinations of protective services as well as services in conjunction are sometimes permitted, but no tariff rule authorizes ventilation service in conjunction with carriers' protective service. Rule 515, I.C.C. 25 (R. 512, 513). Combination services are provided in sequence, one being canceled as the other is commenced. Rule 515 (C), I.C.C. 25. Services in conjunction are simultaneous services. Rule 514 (G), I.C.C. 25. Where necessary to dissipate surplus artificial heat, carriers will adjust ventilators, as in this case (R. 309-314). Where the commodity transported may be more susceptible to cold than to accumulated artificial heat, shippers are permitted by the tariff to instruct carriers to keep the ventilators closed. Rule 515 (D), I.C.C. 25 (R. 530).

For the 90-mile movement from Chicago, Illinois, to Hartford, Michigan, respondent's cars were under shippers' specified service (R. 420), defined in Item 1161, I.C.C. 25, as follows:

> "Shippers' Specified Service" means that protection against frost, freezing or artificial overheating will be supplied by use of heaters furnished, installed, and serviced by carriers as directed by shipper, in accordance with the provisions and charges published in Rules 513, 514, 516, 519, 526 or 527 (R. 503).

Of the rules cited in this definition only the following portion of Rule 514 is material:

Rule 514 (G):

> * * * In the absence of instructions, shipments will be handled under Standard Ventilation * * * (R. 513).

Standard ventilation in conjunction with shippers' specified service was requested for two of respondent's cars for the brief journey beyond heater territory (R. 420). There was no mention of ventilation on the bill for the third car. However, Rule 514 (G) entitled respondent to ventilation service for the third car for the short distance.

Rule 385, I.C.C. 25, requires that under standard ventilation the ventilators are to be closed at 32 degrees and opened when the outside temperature is above 32 degrees (R. 420) and refers to note 1 of Rule 385, page 385 of the tariff, in part as follows:

> Cars arriving at interchange points, junction points, intermediate hold points, at regularly assigned inspection points, also at final destination, or while being held at such points with vents open at a minimum outside temperature of 28 degrees, or with vents closed at a maximum temperature of 34 degrees, will be considered as having been properly handled.

Petitioner's records, accepted in evidence, show conclusively that at no time during the journey from Chicago, Illinois, to Hartford, Michigan, did any of the cars arrive at any of the points mentioned in note 1 of Rule 385 when the outside temperature was sufficiently high to require the ventilators to be opened, nor were they opened during this phase of the movement (R. 219-224). Respondent's witness testified that the outside temperature during the day on which the last of the cars arrived at Hartford was 33 degrees (R. 201). None of respondent's witnesses testified to outside temperatures prevailing when the second car arrived at destination, and on two occasions two of respondent's witnesses said they did not remember what the outside temperatures were when the first car arrived. (R. 208, 220).

Contrary to the statement of the Michigan Supreme Court, shippers' specified service is not rendered in heater territory (R. 505). Rule 514 (K), I.C.C. 25.

Two tariff general rules remain for consideration:

Rule No. 130:

> Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence.

Rule No. 135:

> Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived.

Respondent claimed that when he opened the cars at destination steam and fumes came out, that there was moisture on the ceilings and walls, that the sacks were wet, that sprouts protruded up to three-quarters of an inch, and that the inside temperatures ranged from 90 to 100 degrees (R. 469). There is nothing in the record to show that carriers knew or should have known of these conditions while cars were in their custody.

Petitioner's witnesses, Michigan State Department of Agriculture inspectors, who in the course of their duties examined the bulbs shortly after arrival at destination and again immediately before respondent destroyed them, testified that they were compelled to condemn the bulbs after each inspection due to inherent diseases and that there was no evidence of other damage. (R. 341-346, 367-371)

Respondent alleged that none of the bulbs were fit for use and that during the month of July 1947 the entire lot was destroyed (R. 469).

Suit was commenced against petitioner by virtue of Title 49, United States Code, § 20, subsection 11, in the Van Buren County Circuit Court on September 9, 1948 (R. 8, 9). By subsequent amendment respondent claimed damages of $67,638.95, alleging that the bulbs were delivered to carriers in good condition and received by respondent in a damaged condition (R. 98). At the trial the court denied petitioner's motion for a directed verdict, made at the conclusion of respondent's case (R. 290), on the ground that by the introduction of evidence supporting his allegations respondent had made a *prima facie* case (R. 473-474).

The trial court's first reference to carriers' protective service against cold in the charge (R. 420) was not inaccurate, but a subsequent attempt to give the jury the tariff definition (R. 426) reflects the extent to which the court had been misled (R. 436). The words "and ventilation" are not in the tariff definition. Item 1165, I.C.C. 25. The jury was told that a lack of proper ventilation would sustain a finding of carrier negligence (R. 428).

For the record, but after the jury had withdrawn, the court told petitioner's counsel that his client was not chargeable with inherent or natural heating (R. 431). The jury was later told that the billed instructions referred only to artificial overheating produced by mechanical devices (R. 431-432).

The verdict was as follows:

> Unanimous verdict in favor of the plaintiff, in the amount of $41,797.46, which is sixty per cent of his estimated loss of the wholesale price at Hartford (R. 432).

In response to four questions submitted by the parties the jury found that carriers did not cause freezing or artificial overheating and that the bulbs were not diseased when shipped, but that carriers had negligently failed to ventilate the cars (R. 432).

Verdict and judgment were filed December 13, 1951 (R. 444).

Petitioner's motion for judgment notwithstanding the verdict or for a new trial was grounded, in part, on allegations that the verdict and judgment were inconsistent with the special findings and were contrary to fact and law and that there was no evidence of a negligent failure to ventilate (R. 451-456). Denying the motion on May 7, 1951, the trial court ruled that the presence of naturally generated heat and moisture and delivery of sprouted bulbs to respondent tended to establish that the bulbs were damaged through improper ventilation, that carriers' protective service against cold imposed upon petitioner and its connecting carriers a duty to ventilate in order to dissipate the naturally generated heat and moisture, and respondent's damage evidenced a breach of that duty (R. 475-476). The trial court also said the answers of the jury were consistent with the general verdict (R. 476-477). The conflicting definitions of carriers' protective service against cold were not cited in support of the motion, but on appeal to the Michigan Supreme Court were included with the above grounds by virtue of § 618.60, Michigan Compiled Laws, 1948, § 27.1040, Michigan Statutes Annotated, which permits the citing of an erroneous charge for the first time on appeal (R. 4-7; 494). Claim of appeal was filed May 15, 1951 (R. 483).

The Michigan Supreme Court did not draw a distinction between artificial overheating and inherent, natural overheating (R. 505). It alluded to the tariff prohibition against combining ventilation with carriers' protective service against cold, and held that "it was the duty of the carrier to set a standard of care necessary for the transportation of perishable commodities" (R. 503). In an opinion written by Sharpe, J., and filed March 10, 1953, the Michigan Supreme Court ruled that petitioner and its connecting carriers, in giving carriers' protective service against cold, were under a duty to ventilate if ventilation were necessary to provide a "temperature that would not cause freezing or overheating," relying upon its interpre-

tation of the holding of the Arizona Supreme Court in *Southern Pacific Company* v. *Fred Itule,* 51 Ariz. 25, 74 Pac. 2d 38, 115 A.L.R. 1268 (R. 505).

Petitioner's motion for rehearing was denied in an order of the Michigan Supreme Court dated April 16, 1953 (R. 539).

STATEMENT OF JURISDICTION

Jurisdiction of this Court to review this case by certiorari is conferred by § 1257 of United States Code, Title 28. This provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by this Court by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the statutes of the United States. The statute of the United States involved is the Interstate Commerce Act, § 1, *et seq.*, of United States Code, Title 49.

The Supreme Court of the State of Michigan is the highest court of that state in which a decision could be had in this case. Article Seventh, § 4, of the Constitution of Michigan of 1908; §§ 601.9-601.10, Michigan Compiled Laws of 1948.

The claim of the application of petitioner's tariff, filed with the Interstate Commerce Commission, was raised by respondent in the trial court, and an interpretation of its provisions was included in the charge to the jury and in the trial court's Memorandum of Decision (R. 256, 420, 426, 436, 468). Petitioner, on its appeal to the Supreme Court of Michigan, assigned error to the charge (R. 4-7, 494).

THE QUESTION PRESENTED

The question here presented is whether respondent is bound by petitioner's tariff which does not authorize the furnishing of ventilation service in conjunction with carriers' protective service in heater territory.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The court below erred in ruling that petitioner and its connecting carriers were under a duty to furnish a service which, under the Interstate Commerce Act and tariffs filed pursuant thereto, they could not legally furnish.

2. The court below erred in holding that the duty of petitioner and its connecting carriers was not measured by the rules and regulations of the controlling tariff.

3. The court below erred in holding that respondent was not bound by the tariff.

4. The court below erred in ruling that petitioner and its connecting carriers were under a duty to furnish a service not published and filed according to law.

5. This case involves a federal question of substance which has not heretofore been determined by this Court.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION BELOW

The opinion of the Supreme Court of Michigan was reported as *J. C. Van Lierop* v. *Chesapeake and Ohio Railway Company,* 335 Mich. 702, 57 N. W. 2d 431, and appears at R. 500-508.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked by § 1257 of United States Code, Title 28.

The judgment of the Supreme Court of Michigan was rendered on March 10, 1953. Rehearing was denied in that court's order of April 16, 1953.

A detailed statement in support of the jurisdiction is contained in the petition for writ of certiorari at page 8.

STATEMENT OF THE CASE

A statement of the case was set out in detail in the petition for writ of certiorari at pages 1-8.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Michigan erred:

1. In ruling that petitioner and its connecting carriers were under a duty to furnish a service which, under the Interstate Commerce Act and tariffs filed pursuant thereto, they could not legally furnish.

2. In holding that respondent was not bound by petitioner's tariff.

3. In upholding as a definition of carriers' protective service a definition which does not appear in the tariff.

4. In imposing upon petitioner and its connecting carriers a duty to ventilate in conjunction with carriers' protective service, contrary to the tariff.

5. In holding that even if no instructions requesting an additional transportation service are given by the shipper, railroads must give such service if to refrain from doing so will result in damage to the shipment.

ARGUMENT

I

The Decision of the Court Below Is Not Correct

The court below erroneously ruled that, despite the fact that the controlling tariff did not authorize coupling in heater territory of ventilation service with carriers' protective service against cold, petitioner and its connecting carriers were under a duty to give the dual service to prevent overheating.

The court below gave the following reasons for its decision:

(a) Ventilation was necessary in order that the goods would not be overheated.

(b) Respondent could not order ventilation.

(c) Carriers were in sole control of the shipment.

(d) Carriers provided protection against *artificial* overheating in both territories and ventilation service in conjunction with heater service in the area beyond heater territory.

(e) Carriers were under a duty to handle the goods in a reasonably prudent manner as to all matters not covered by instructions.

A review of these reasons in the same sequence shows conclusively that they do not support the decision of the court below.

(a) The court ruled that carriers' protective service against cold included a duty to give ventilation service in heater territory for the prevention of overheating (*sic*), holding that, if in heater territory ventilation was necessary

to prevent overheating, carriers were under a duty to ventilate. It should be pointed out here that the jury found expressly that carriers did not cause the bulbs to be damaged by frost, freezing, or artificial overheating (R. 432). The court below did not distinguish between overheating produced by mechanical means and natural overheating generated by the perishables. The tariff makes this distinction. Item 1165, I.C.C. 25. And, after a fashion, the trial court made the distinction (R. 431-432). It may well be that ventilation service was necessary if the shipment was to be protected against natural heat, but the need for a service cannot impose upon carriers a duty to give it unless it is authorized in the tariff, particularly where carriers have been ordered to give another service, non-performance of which would result in damage for which carriers would certainly be liable. This assumption of an added duty would confer on respondent an unlawful preference. *Davis* v. *Cornwell*, 264 U.S. 560.

There is no obligation imposed upon a railroad to render special service, not provided in its published tariffs, to save goods in interstate movement from loss or damage—at least where it is not shown that the carrier knew or should have known of conditions requiring emergency action. *Dolan Fruit Co.* v. *Davis*, 111 Neb. 322, 196 N.W. 168, 32 A.L.R. 107; *Clemons Produce Co.* v. *Denver & R. G. R. Co.*, 203 Mo. App. 100, 219 S.W. 660. And where such knowledge was present and the special service would have been furnished solely to prevent loss, it has been held that performance of the service would have been an illegal preference and violative of the Interstate Commerce Act. *Dolan Fruit Co.* v. *Davis, supra.*

Because the nature of heater territory, in which carriers' protective service is given, is such that application of a ventilation service sufficiently effective to prevent an accumulation of the type of heat naturally

generated by perishables would defeat the purpose for which the protective (heater) service was instituted, heater territory railroads will not undertake to give a ventilation service for the dissipation of naturally generated heat simultaneously with the heater service and so stipulate in the tariff. Item 1165, Rules 330 and 515, I.C.C. 25.

(b) Respondent's inability to order ventilation service in heater territory is a corollary. His sellers had requested heater service. While it is and has been petitioner's position, based upon its interpretation of the tariff, that heater service is mandatory in heater territory during the months in which these cars moved, if the Court should find that respondent's shippers could have ordered ventilation service the fact remains that they did not. They ordered heater service, and this service clearly precluded ventilation service in heater territory. They had asked for, and were entitled to, ventilation service coupled with heater service beyond heater territory, but under the tariff they could have one or the other in heater territory, but not both.

The furnishing of ventilation service in heater territory would clearly have given the respondent a preference in violation of law. *Davis* v. *Cornwell, supra; W. H. Blodget Co.* v. *New York C. R. Co.*, 261 Mass. 365, 159 N.E. 45, 55 A.L.R. 900.

(c) The control exercised by petitioner and its connecting carriers was qualified by the type of accessorial service requested by respondent's shippers and was no greater than that which has always been the basis for common carrier liability. The exception rising out of the inherent tendencies of goods carried to deteriorate has always been implicit in the historic concept. *C. & O. Ry. Co.* v. *Thompson Mfg. Co.*, 270 U.S. 416, 421, 423. The bills of lading reflect it (R. 22-23). The Interstate Commerce Commission suggested the phrasing of tariff rules 130 and 135, cited at page 5 of this petition. *Perishable Freight Investigation*, 56 I.C.C. 483.

Among the factors contributing to the error of the court below was its apparent impression that Title 49, United States Code, § 20, subsection 11, imposed insurer liability on carriers. To paraphrase, the court said that carriers should have given ventilation service if ventilation service was necessary. (R. 505) The statute cited does not deprive petitioner of the common law defense arising out of the inherent nature of perishables to deteriorate. *Adams Express Co.* v. *Croninger*, 226 U.S. 491.

(d) Tariff authorization of ventilation service coupled with a heater service in one territory cannot legalize the giving of the ventilation service in conjunction with heater service in another territory without specific tariff authorization of the coupled services. *Davis* v. *Cornwell, supra.* The case against it is stronger here, where the tariff in so many words prohibits such coupled service. Rules 330, 515, I.C.C. 25. Failing to distinguish between artificial overheating and natural overheating led the court below into the obvious error of concluding that, because heater services in both territories were designed to combat artificial overheating, *ergo* there was a duty to prevent overheating. In view of the jury's finding (R. 432), the only type of overheating which remained to be prevented, and which carriers did not protect against, was natural overheating. (R. 506)

To protect cars against artificial overheating in heater territory the adjustment of ventilators for dissipation of surplus artificial heat is occasionally necessary, as in this case (R. 309-314). Such adjustments are spasmodic and, while there is often a relation between them and the outside temperatures, the relation is not essential. In any event these erratic adjustments cannot satisfy the requirements of a ventilation service designed to control accumulation of natural heat. Rule 385, Note 1, I.C.C. 25. The court below thought that shippers' specified service, with which ventilation service could be coupled, was permitted in heater territory (R. 505). It failed to recognize the obvious

fact that the basic distinction between the territories in which respondent's cars moved prompted carriers to withhold the coupled services in one territory and permit them in another. Beyond heater territory weather conditions and terrain do not present the same compelling reasons which move heater territory railroads to refuse to couple ventilation service with heater service in their area. Along the 90-mile portion variations in elevation above sea level are minute, stations and points of interchange are not so far apart, the range of temperatures is narrower, and the temperatures are ordinarily less extreme. In this area the rendition of ventilation service will not defeat the purpose of heater service. Hence, in regions other than heater territory, carriers permit, and even encourage, the coupling of ventilation service and heater service. Rule 514 (G), I.C.C. 25. This is not to say, however, that non-existence of the distinction would justify a decision requiring carriers to furnish a transportation service not held out to the shipping public in tariffs published and filed in accordance with law. *C. & O. Ry. Co.* v. *Westinghouse C. K. & Co.*, 270 U.S. 260, 266; *Davis* v. *Cornwell, supra; Chicago & Alton R. Co.* v. *Kirby*, 225 U.S. 155.

Ventilation is a transportation service. Title 49, United States Code, § 1 (3) (a).

Transportation services can be furnished by carriers only in accordance with the terms of their tariffs duly published and filed with the Interstate Commerce Commission. Title 49, United States Code, § 1, *et seq.; Dolan Fruit Co.* v. *Davis, supra.*

It, therefore, follows that, if carriers were under a duty to furnish ventilation service, coupled with heater service in heater territory, that duty will be found in the tariff.

The tariff in this case is Perishable Protective Tariff No. 14, I.C.C. No. 25.

The tariff is clear. It does not provide the coupled service. Rules 330, 515, I.C.C. 25.

(e) *Southern Pacific Co.* v. *Fred Itule,* 74 Pac. 2d 38, 115 A.L.R. 1268, is the only case relied upon by the court below for its ruling that ventilation service should have been coupled with heater service in heater territory. While it is true that, when removed from context, the broad statement attributed to the Arizona Supreme Court lends the color of logic to the decision of the court below, it becomes obvious upon reasonably careful examination that the Arizona court did not intend the construction placed upon the language quoted by the court below. The nature of this petition precludes inserting here a detailed brief of the *Itule* case, which may be found in the Record at pages 520-522. The *Itule* case is authority for petitioner's contention that the ruling of the court below is incorrect. The Arizona Supreme Court reversed and remanded in favor of defendant carrier, ruling that the trial court's charge was fatally erroneous although it imposed on the carrier a duty for less stringent than that asserted by the trial court in this case. The language relied on by the court below means, in fact, that carriers must show that they handled the shipments in accordance with shippers' instructions and that they " * * * exercised reasonable care to prevent any damage from any cause not necessarily involved in the method of transportation so chosen." *Southern Pacific Co.* v. *Fred Itule, supra.* In the instant case the shippers elected carriers' protective service, a method of transportation which necessarily involved heater service only. The damage resulted from natural heat generated by the perishables, if the court below was correct in saying that the damage resulted from lack of ventilation.

In upholding the trial court's definition of carriers' protective service, which was not the definition published in the tariff, the court below in effect gave its approval to the trial court's submission to the jury of a provision purportedly set forth in the tariff but which, in fact, did not appear in the tariff. The decision of the court below, in imposing upon carriers a duty to perform a service not

published in tariffs filed with the Interstate Commerce Commission, and approving a charge in which the trial court undertook to rewrite an applicable tariff provision, are clearly erroneous in light of federal law and decisions of this court cited herein.

II

The Case Involves a Federal Question of Substance

The instant shipments moved in interstate commerce pursuant to Perishable Protective Tariff No. 14, I.C.C. No. 25, published and filed with the Interstate Commerce Commission, as required by law. Title 49, United States Code, § 1, *et seq.* The question is, therefore, a federal one.

Virtually without exception, perishables move by rail in the United States under the tariff in question. *Perishable Freight Investigation,* 56 I.C.C. 452.

The application of the tariff to the respective rights of shippers and liabilities of rail carriers and the effect of such application upon the consuming public is, therefore, a question of great importance to all railroads, and a final decision thereon by this Court is a matter of general public interest.

III

The Question Has Not Heretofore Been Determined by This Court

The court below cited no decisions of this Court in support of its denial of tariff application.

This Court, it is true, has decided cases involving the application of other tariff provisions, but no analogous decisions of this Court could be found.

CONCLUSION

The only sound conclusion from the facts is that the tariff does not authorize the giving by carriers of ventilation service for the purpose of protecting against natural, heat in heater territory, in conjunction with carriers' protective service against cold; that respondent was

not entitled to have such coupled service for the protection of his goods in heater territory; that to have given this service would have subjected petitioner to a charge of granting an unlawful preference in violation of federal law; and that respondent is bound by the limitation contained in the tariff. As the decision of the court below is not correct and the case involves a federal question of substance which has not heretofore been determined by this Court, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Michigan.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 172

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

J. C. VAN LIEROP,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATEMENT OF THE CASE

Under *Perishable Protective Tariff No. 14 ICC 25* (hereinafter referred to as ICC 25), the shipper could have ventilation in conjunction with heater service in heater territory by requesting *Carriers' Protective Service,* rather than *Carriers' Protective Service: keep vents closed.* Rule 515 (D) ICC 25. Outside of choice of service, the shipper could give no other instructions for handling in heater territory. Rule 515, ICC 25. Beyond heater territory ventilation was combined with heater service by mandate of the Tariff Rule 514, ICC 25.

Ventilation is essential for safe transportation of gladioli bulbs (R. 136, 137, 152, 153, 156, 417). The gladioli bulbs were packaged in burlap bags, the customary container for shipment (R. 126, 280); and the bags were loaded in a manner to provide air channels between the bags for the purpose of providing ventilation, as was customary practice of loading (R. 130, 131, 166). The bulbs, when loaded in cars will sweat and create moisture (R. 136, 156, 417), and create a natural heat (R. 152). The moisture must be taken out by ventilation (R. 136, 137,

152, 153, 156, 157). With the moisture taken out, a temperature of 40 to 60 degrees will not hurt the bulbs (R. 136, 412); but, with moisture, the bulbs will break their dormancy and start to grow at a temperature as low as 40 degrees (R. 156, 363, 412). The temperature determined by the carriers for safe transporation was 32 degrees (R. 319). Too high a temperature was maintained in the cars (R. 309-314). The carriers did not ventilate, except on few occasions where cars were standing (R. 309-314, 375-377).

Petitioner on page 3 of Petition cites Rule 514 (G), meaning to cite Rule 514 (J).

The bulbs were not diseased when shipped, and were damaged in transit (R. 432).

STATEMENT RE LACK OF JURISDICTION

I. There is no jurisdiction for the granting of the petition in certiorari.

(a) Where the record before this Court fails to indicate a Federal question, certiorari to a State Supreme Court may not be granted.

No tariffs are of record for the consideration of the petition in this case.

Tariffs not being a part of the record in this Court, the interpretation of the Supreme Court must be considered. *Louisville and Nashville Ry. Co. vs. Maxwell,* 237 U. S. 94, 35 S. C. R. 94 (1915). But in the case at bar, the Supreme Court did not interpret or quote the tariffs referred to. The record does not indicate change of the tariffs referred to in the petition were in evidence in the trial Court. Respondent is of the belief that at least one of the tariffs so referred to is mentioned for the first time in the petition for certiorari. Whether there is a "right, privilege or immunity" which petitioner can claim cannot appear from the ICC Act standing alone. The record, as it now stands supporting the petition fails to indicate a Federal question and therefore, it is submitted that the writ for certiorari should be denied.

Without waiving in any respect the question of jurisdiction, respondent further respectfully alleges that this is not a proper case for the granting of certiorari for the reasons hereinafter set forth.

ARGUMENT

(Perishable Protective Tariff No. 14, I.C.C. 25 is cited in this Brief as ICC 25.)

I. THE QUESTION PRESENTED BY PETITIONER WAS NOT DULY RAISED IN LOWER COURT EXCEPT AS RAISED IN CLAIM OF ERROR IN TRIAL COURT'S INSTRUCTION TO JURY, ON APPEAL TO THE SUPREME COURT OF MICHIGAN.

The question raised here by Petitioner, regardless of how stated in its petition on pages 8 and 9, and in its brief on pages 11-12, simply stated, is whether ventilation service can be furnished in conjunction with Carriers' Protective Service under the applicable tariff provisions.

This question in any of its forms has not been raised in the lower court for consideration.

The nearest approach to it is Petitioner's claimed error No. 3 of its brief on page 11. This refers to the trial court's instruction, claimed erroneous in its assignment of error No. 37, raised for the first time in the Michigan Supreme Court (R. 494, Petition 7). Raised in this manner, the question in the lower court was limited to the correctness of the trial court's instruction.

The questions raised by Petitioner in its brief and argument in the lower court are as follows:

"1. Was the following charge contrary to existing law and did the court err in giving such charge to the jury?

> 'From Grants Pass, Oregon, to Chicago, Illinois, the cars in question were under the so-called Carriers' Protective Service, which means that the carriers were to protect the shipment against frost, freezing, or artificial overheating, furnishing, if necessary, artificial heat *and ventilation* or such other protective service as might be necessary to obtain that result. (R. 426)'.

"2. Was the verdict and judgment contrary to the great weight of evidence?

"3. Should Defendant's motion for directed verdict have been granted?

"4. Should Defendant's motion for judgment notwithstanding the verdict have been granted?

"5. Did Plaintiff fulfill his duty to mitigate his damages?

"6. Was the verdict and judgment excessive?

"7. Did the court err in denying Defendant's motion for new trial?"

The lower court in its decision answered all questions raised (R. 500-508).

The Michigan Supreme Court does not pass on arguments raised in brief but not included in statement of questions involved, *Marrs vs. Taylor,* 327 Mich. 674, 42 N.W. 2d 780; nor on questions raised in statement thereof but not argued in brief, *Gerweck vs. Monroe Co. Treasurer,* 317 Mich. 53, 26 N.W. 2d 864; nor on questions not raised in statement of reasons and grounds for appeal, *Baumgarten vs. Tasco,* 312 Mich. 161, 20 N.W. 2d 144 (R. 4-7, 492, 494).

This Court held, in *New York Dock Co. vs. The Poznan,* 274 U. S. 117, that questions for review on certiorari to be considered must have been duly raised in the court below.

Then, the only question for consideration here is Petitioner's question No. 3, as set forth in Petitioner's brief on page 11, which is:

> "3. In upholding as a definition of carriers' protective service a definition which does not appear in the tariff."

This question is limited to the correctness of the trial court's instruction to the jury. In deciding this question it was not necessary for the lower court to do more than consider and construe the definition of Carriers' Protective Service, Item 1165, Perishable Protective Tariff No. 14, ICC 25, which reads as follows:

> "CARRIERS' PROTECTIVE SERVICE
>
> 'Carriers' Protective Service' means that the carriers will protect the shipment within the Heater Territory (See Rule 500) against frost, freezing, or artificial over-heating, *furnishing, if necessary,* artificial heat *or such other protective service as may be necessary to obtain that result."* (Italics supplied).

Where the service contracted by the shipper was "Carriers' Protective Service" and not "Carriers' Protective Service: keep vents closed", Rule 515 (D), ICC 25, and the carriers were in full control of the cars (R. 503, 505), it is obvious that the language of the definition placed in italics above included "ventilation" as *such other service* to prevent artificial over-heating by reduction of car temperatures. The lower court, in deciding that the trial court's instruction was not erroneous, stated:

> "Under the weather conditions existing at the time of the shipments, ventilation or artificial heat was necessary in order that the bulbs could have a degree of temperature that would not cause freezing or overheating" (R. 505).

In addition to this, Petitioner, in its Petition on page 3, states as follows:

> "Where necessary to dissipate surplus artificial heat, carriers will adjust ventilators, as in this case (R. 309-314)."

It is Respondent's contention that the trial court's instruction was not erroneous as found by the lower court; that the claimed error in this instruction is the only question properly raised in the court below and presented here for consideration; that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

However, in the event the Court decides that the questions presented by Petitioner are properly raised here for consideration, Respondent, in the argument that follows, answers Petitioner's brief to show that furnishing of ventilation in conjunction with Carriers' Protective Service was not prohibited by applicable Tariff provisions, but was included within the terms of such protective heater service to give the carrier complete control over the shipments without instructions for handling from the shipper.

II. UNDER PERISHABLE PROTECTIVE TARIFF NO. 14, ICC 25, RULE 515, GOVERNING CARRIERS' PROTECTIVE SERVICE, WITH THE GLADIOLI BULBS ENTIRELY UNDER CONTROL OF THE CARRIERS, IT WAS THE CARRIERS' DUTY TO DETERMINE THE STANDARD OF CARE AND HANDLING FOR TRANSPORTATION WITHOUT NEGLIGENCE.

Under Tariff Rule No. 130, the carrier, in shipments of perishable goods, undertakes to retard from deterioration or decay "insofar as may be accomplished by reasonable protective service of the kind and extent requested by the shipper, performed without negligence" (Rule No. 130, ICC 25) (Petition 5).

Carriers' Protective Service was requested in Heater Territory from Grants Pass, Oregon, to Chicago, Illinois. Shippers' Specified Service — Rule 514 beyond to Hartford, Michigan.

The shipper, with years of experience of shipping carloads of Gladioli bulbs, did find these instructions proper to insure safe transportation (R. 135, 136, 146).

Tariff Rule No. 135 (Petition 5) states: " * * * The duty of the carriers is to furnish *without negligence* reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because * * * the *directions* of the shipper were incomplete, inadequate or ill-conceived".

The bulbs were in good condition and in a dormant state when shipped (R. 475, 503). With ventilation, inside car temperatures of 40 to 60 degrees are not too high for safe transportation (R. 136, 412). Without ventilation, a temperature of as low as 40 degrees would be too high (R. 156, 363, 412), as bulbs sweat and create moisture when loaded for shipment (R. 136, 156, 417). Without ventilation, at temperatures of 40 to 45 degrees, in moist condition, the bulbs will break their dormancy and commence to grow (R. 156, 363, 412).

The inside car temperatures from Klamath Falls, Oregon to Council Bluffs, Iowa, ranged from 40 to 46 degrees or more in all cars (R. 309-314). Temperatures are not shown by the carriers from Grants Pass, Oregon, to Klamath Falls, Oregon, taking two to three days in transit,

or from Council Bluffs, Iowa, to Hartford, Michigan; but, on arrival at Hartford, inside car temperatures were 90 to 100 degrees (R. 193, 197, 201-202, 376-377).

Petitioner does not claim in its brief that the carriers used due care to protect against the mortality of the bulbs under Rule No. 130, nor that the carriers acted without negligence, nor that the directions of the shipper were incomplete, inadequate or ill-conceived under Rule 135, but attempts to excuse the carriers by claiming that under Carriers' Protective Service the carriers could not furnish ventilation to prevent over-heating.

It was the carriers' duty under the Tariff Rules No. 130, 135 and 515, ICC 25, to maintain a degree of temperature in the cars that would not set natural characteristics or the inherent infirmity of the bulbs in motion by breaking their dormancy and commencing growth. This is what the lower court meant by "degree of temperature that would not cause freezing, or overheating" (R. 505).

Naturally, once a growing condition was created in the cars, the bulbs broke their dormancy and commenced to grow. The growing bulbs naturally gave off energy in the form of heat, but the resulting damage was caused by the negligence of the carriers in failure to use due care to preserve the bulbs. In *Williston on Contracts,* Sec. 1093, it is said:

> "The extent of the carrier's duty in regards to such goods is to use reasonable care and diligence to preserve them from their own mortality." *Nchell vs. Valles Cura,* 293 U. S. 296, 55 SCT 194, 79 LED, 373. *The Chesapeake & Ohio Ry. Co. vs. Thompson Mfg. Co.,* 270 U. S. 416, 46 SCT 319, LED 695.

The carrier is liable if its negligence was conducive to setting the inherent infirmity of the goods in motion. 13 CJS — *Carriers,* Sec. 79, p. 153-154.

While the record does not show it, had the car temperatures been maintained around 32 degrees, the standard set by the carrier, ventilation would not have been necessary; but, at temperatures of 40 to 45 degrees, it was essential to remove the moisture from the cars by ventilation (R. 136, 137, 152, 153, 156, 417, 505).

Respondent has pointed out that ventilation to reduce car temperature was within the definition of the term "Car-

riers' Protective Service", as found by the lower court, in holding the trial court's instruction not erroneous.

The verdict of the jury was consistent with the facts in the special finding that the bulbs were damaged by lack of ventilation by reason of the negligence of the carrier, and also as a general verdict it is consistent with a finding that the bulbs were damaged by over-heating, not by mechanical means, but by reason of the carriers' failure to furnish proper care and attention, including ventilation.

III. FURNISHING OF VENTILATION IN CONJUNCTION WITH CARRIERS' PROTECTIVE SERVICE IS NOT PROHIBITED, BUT IS AUTHORIZED BY APPLICABLE TARIFF PROVISIONS OF PERISHABLE PROTECTIVE TARIFF NO. 14, ICC 25.

(a) Answer to Paragraph I (a), Petitioner's Brief.

Is there any merit to Petitioner's contention that ventilation service was not authorized in Perishable Protective Tariff No. 14 ICC 25, in conjunction with the heater service called Carriers' Protective Service, to prevent overheating, natural or otherwise, where not the result of mechanical means?

To determine this question takes more than a conclusion, but an analysis of the applicable tariff rules. Such an analysis does not support Petitioner's contention.

The basis of Petitioner's contention that the carriers are prohibited from furnishing ventilation under Carriers' Protective Service is Rule 330 (A), ICC 25, which reads as follows:

> "A. Ventilation in conjunction with refrigeration service or protective service against cold will be supplied only to the extent authorized in the rules governing the class of refrigeration service or protective service against cold to be furnished."

Under this rule the question narrows itself to "the extent authorized" in Rule 515, ICC 25, governing Carriers' Protective Service.

But Rule 515 specifically gives the shipper the choice of such service, with ventilation or without ventilation, as

provided in Paragraph (D) thereof, which reads as follows:

> "(D) On a shipment originating in heater territory (Part I), shipping order and bill of lading must carry one of the following instructions:
> 'Carrier's Protective Service'
> 'Carriers' Protective Service: keep vents closed'."

Paragraph (A) of Rule 515 reads:

> "(A) Carriers' Protective Service will be furnished within Heater Territory on perishable freight loaded in refrigerator cars, subject to the following:
> 1. On shipments originating within the Heater Territory (Part I), upon request of shipper, except as otherwise provided in Paragraph B."

The refrigerator cars must be equipped with ventilating devices as required by Rule 500, as provided as follows:

> "(A) Application: — The rules and charges published by this Section covers Carriers' Protective Service * * * and Shippers' Specified Service, as defined * * * and apply on shipments of perishable freight * * *."
> (B) Exceptions: — Services referred to in Paragraph A will not be applicable on:
> 1. Shipments loaded in a refrigerator car not equipped with *ventilating devices* * * *." (Italics supplied).

Paragraph B of Rule 515 deals with potatoes and has no application here.

Paragraph C of Rule 515 deals only with apples and pears and obviously doesn't govern this case, but consideration of that paragraph offers a fair interpretation of Carriers' Protective Service in reference to handling of these bulbs relative to ventilation. It, in part, provides:

> "When a shipment forwarded from origin under ventilation is subsequently placed under Carriers' Protective Service, ventilation *instructions* will be canceled at the time it is placed under Carrier's Protective Service, and it will be thereafter handled in

heater territory (Part 1) without regard to such *instructions.* After shipment passes beyond heater territory (Part 1) it will be handled under standard ventilation as provided in Section 3, unless shipper, owner of consignee files specific *instructions* to the contrary." (Italics supplied).

The key word is "instructions". That paragraph does not say ventilation will be canceled. It says ventilation *instructions* will be canceled, and shipment will thereafter be handled in Heater Territory without regard to the shipper's *instructions.* It does not say ventilation is authorized while under Carriers' Protective Service, but it doesn't say it is prohibited. Where ventilation is required for safe transportation of the perishable goods before being placed under Carriers' Protective Service and afterwards, can any other conclusion be reached but that ventilation will be furnished while under Carriers' Protective Service? The implication is plain that the carriers take full control of the ventilation while in heater territory, in order to carry the goods safely in accordance with their legal duties without negligence.

The service contracted here was *not* "Carriers' Protective Service: keep vents closed".

The jury found the bulbs damaged by lack of ventilation in transit by reason of negligence of the carrier (R. 432).

The lower court did not impose upon the carriers an additional or special service; it only held the carriers responsible for failure to render the service contracted.

(b) Answer to Paragraph I (b), Petitioner's Brief.

Petitioner contends that Carriers' Protective Service was mandatory for shipment of these cars (R. 502, 513, Petitioner's Brief, p. 14), and that no other car service could be ordered, such as furnishing of ventilation, which Petitioner assumes was not included in Carriers' Protective Service. Noting in Rule 515 Par. (C), ICC 25, that ventilation instructions will be canceled under that protective service, the Rule is subject to the conclusion that Carriers' Protective Service is mandatory in heater territory, but Respondent cannot agree with Petitioner's statement that if ventilation service could have been ordered it was not,

for, in fact, on two cars the instructions on the Bills of Lading commenced with the words "Standard Ventilation", (R. 17, 21), which Respondent has always assumed referred to Shippers' Specified Service, but nevertheless, it was there. Further, Respondent cannot agree with the conclusion that to furnish ventilation in heater territory was a preference and violation of law. If there was any violation of law, it would exist in violation of Title 49, United States Code, Sec. 20, Subsection 11, by the carrier in promulgating tariff rules exempting itself from liability for failure to use reasonable care in shipment of perishable goods.

Watson Brothers Transportation, Inc. vs. Feinberg Kosher Sausage Co. (1951) 193 F 2d 28, 101 F Supp. 403.

(c) Answer to Paragraph I (c), Petitioner's Brief.

It was held in *Atlantic Coast Line Ry. Co. vs. Georgia Packing Co.* (1947) 164 Fed. 2d page 1, where the Court was construing Tariff Rules 130 and 135, that a carrier of perishable freight is responsible for negligent failure to carry out the shipper's instructions. It was held in *Chicago and Northwestern Ry. Co. vs. Whitnack Produce Co.*, 358 U. S. 369, that the shipper makes out a *prima facie* case under the presumption of negligence of the carrier where goods received by the carrier in good condition are delivered in bad condition. And in *Southern Pacific Co. vs. Itule*, 51 Ariz. 25, 75 P 2d 38, 115 ALR 1268, 1274, it was held that the *prima facie* case must be met by the carrier's satisfying the jury that it handled the perishable goods in accordance with the shipper's instructions, given by the shipper, *and in a reasonable, prudent manner as to all matters not covered by such instructions.*

The shipper contracted for Carriers' Protective Service. Under this service, the carriers would accept no instructions from the shipper. The standard of care, the car temperature, the lighting and extinguishing of heaters and ventilation were all in control of the carriers (R. 503). The lower court found this service to include the duty to ventilate at the proper times and places, holding the carriers liable, not as an insurer, but for the negligent failure, as found by the jury (R. 505).

(d) Answer to Paragraph I (d), Petitioner's Brief.

Respondent has shown that Tariff Rule 330, where applied to Rule 515, ICC 25, does not prohibit ventilation in conjunction with the heater service, but includes ventilation with heater service in a protective service entirely in control of the carrier, aptly named *Carriers' Protective Service.*

The lower court compared the similar language of the definition of Carriers' Protective Service (Item 1165) and Shippers' Specified Service (Item 1161). Rules 515 and 514, ICC 25, noting that neither service makes any mention of ventilation, although both items concerned the protection of shipment of perishable commodities against frost, freezing, or artificial over-heating. The court then construing the meaning of Carriers' Protective Service, found that the trial court had not erred to include ventilation within this term (R. 505). The lower court's conclusion is warranted. Under Shippers' Specified Service the tariff doesn't say to the shipper: "You are authorized to have ventilation in conjunction with this heater service". It says: "If you don't give further instructions for ventilation, the shipment will be handled under standard ventilation". This is provided in Rule 514 (J) ICC 25, which reads as follows:

> "J. Carriers will accept additional *instructions* for ventilation service as authorized in Section 3. In the absence of such *instruction* shipments will be handled under standard ventilation." (Italics supplied).

It is evident that furnishing of ventilation is compatible with heater service and a necessary part thereof.

From this comparison, it is logically concluded that where the carrier will accept no instructions from the shipper for handling the heaters, it would accept none as to ventilation, but intended and contracted to supply ventilation service under Carriers' Protective Service.

The lower court didn't miss the basic distinction between the two territories, so aptly described, in geographical and physical aspects, in Petitioner's Brief on page 16. All the carrier has done is withhold instructions by the shipper in one territory, and required instructions

by the shipper in the other, *A fortiori*, because of the some 2400 miles under Carriers' Protective Service, where the carrier by his own choosing has assumed complete control of the shipment, it chose not to be hampered by instructions from the shipper in any respect.

It is not a case of difference in territory, causing the carrier to refuse ventilation service in conjunction with heater service in one, and requiring it in the other, but rather the refusing of instructions in one and requiring instructions in the other.

If the tariff is clear, it is clear that ventilation service is authorized in conjunction with heater service. The duty to furnish ventilation in heater territory under Carriers' Protective Service existed as found by the lower court. Rules 330, 515, ICC 25 (R. 505).

(e) Answer to Paragraph I (e), Petitioner's Brief.

Careful examination of *Southern Pacific Co. vs. Itule*, 74 P. 2d 38, 115 A.L.R. 1268, supports the lower court's decision. In the *Itule* case, the court was making an exception to the affirmative defenses and proof required of a common carrier, under the insurer doctrine. In holding an instruction based on the insurer rule erroneous and sending the case back for a new trial, the court ruled for the first time in Arizona that in shipments of perishable fruits and vegetables the burden of proof required of the carrier to meet the presumption of negligence, where plaintiff has established a *prima facie* case, was to show affirmatively that it handled them in the method requested by the shipper, stating on page 1274 as follows:

> "This instruction was fatally erroneous, for, as we have pointed out, the law merely requires, in cases like the present, that the defendant carrier satisfy the jury that it handled the tomatoes in accordance with the instructions given by the shipper, *and in a reasonable, prudent manner as to all matters not covered by such instructions.*" (Italics supplied).

In the instant case, the gladioli bulbs were entirely under control of the carrier in heater territory, under the *protective* service, which Petitioner says was compulsory and so found by the court (R. 502). Under that service

it was the carrier's duty to determine the standard of care for safe transportation; the shipper could give no instructions for lighting or extinguishing the heaters or the degree of temperature to maintain in the cars. Inside car temperatures of 40 degrees was too high when the bulbs were in a moist condition (R. 363, 412). But, inside car temperatures from 40 to 60 degrees would have been safe for transportation, had the moisture been taken out by ventilation (R. 136, 412). Gladioli bulbs are not like tomatoes or other perishable fruits or vegetables, which will ultimately decay although no human agency has approached them after their maturity. The bulbs were in a dormant condition when shipped (R. 475, 503), and would have remained in that condition indefinitely (R. 143), except for the negligence of the carrier in handling. It is not simply a case of not artificially overheating, but one of negligent handling by maintaining too high a temperature in the cars. The carriers had determined 32 degrees to be a proper temperature for safe transportation (R. 319). But with car temperatures of 40 degrees and above in the moist condition, the carriers even increased the thermostat setting of the automatic heaters to 40 degrees in the last two cars (R. 312, 313). This was over-heating by failure to reduce the car temperatures and to take out the moisture by ventilation, as so found by the jury in the trial court (R. 432). These were things the carriers should have done within the terms of the carriers' protective service contract. These matters were not covered by instructions, as none could be given. This case falls within the reasoning of the *Itule* case, for the carriers failed to handle in a reasonable, prudent manner as to those matters under Carriers' Protective Service not covered by instructions.

IV. THE CASE DOES NOT INVOLVE A FEDERAL QUESTION OF SUBSTANCE.

(a) In answer to Petitioner's Argument II.

The question of construction of the tariff rule, though a Federal question, to the extent necessary for decision of the lower court, is not one of great public interest. In the broader aspect of furnishing ventilation in conjunc-

tion with heater service, perhaps the best indication of the importance of this question to the railroads and public is to note that the Petitioner did not make any pretense of claim that ventilation was not a part of its Carriers' Protective Service, upon its motion for judgment nothwithstanding or for a new trial, in the trial court (R. 451), or in its assignment of error on appeal, until nearly two years later (R. 4-7, 492, 494).

V. THE COURT BELOW APPLIED THE APPLICABLE TARIFF PROVISIONS TO THE CONTRACT OF CARRIAGE.

(a) In answer to Petitioner's Argument III.

Contrary to Petitioner's claim, the lower court did find the tariff provisions applicable as part of the contract of carriage (R. 502), and in doing so upheld the trial court's instruction, which specifically applied the tariff provisions to this case (R. 505).

CONCLUSION

The only question properly raised here was correctly decided in the court below in finding the trial court's instructions not erroneous by definition of the protective service set out in the applicable tariff.

It was the carriers' duty while the shipments were moving in heater territory under Carriers' Protective Service, to determine the standard of care and handling for transportation without negligence. The carriers are liable for the negligent failure to transport without damage.

It was the carriers' duty to ventilate at the proper times and places under the applicable provisions of the tariff governing these shipments. The negligent failure to do so, resulting in damage to the shipments, renders the carriers liable.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court,

and that the Petition for a writ of certiorari should be denied.

Dated: August 6, 1953.

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